Supreme Court, U. S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

NO. 80-1140

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARK J. THOMAS
~~BETRA MANUFACTURING COMPANY~~
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. THOMAS.
REPRESENTING SELF, OWNER

BETRA MANUFACTURING COMPANY
50 BELLEVUE AVENUE
SAN JOSE, CALIFORNIA
95110

408-292-9312

QUESTIONS PRESENTED

What is the value of the due process clause of the United States Constitution, Fifth Amendment guaranteeing a fair trial? Is due process denied if the judges of a Federal Appellate Court disregard the ethical principles behind the American Bar Association Canons of Judicial Conduct for Federal Judges by not taking appropriate action against a federal agency admitting in oral hearing before the Appeals Court their prosecution of the respondent was based on a fraudulent document submitted by the charging party?

Is a fair trial not further denied if the Administrative Law Judge made pretrial ex parte communication with the agency, denied my witnesses, and acted as an advocate of the agency during the trial; the N.L.R.B. Board condoning this action by stating no injustice was done?

What is the value of a Constitutional clause that dictates fairness in a court of law if not one of the twenty-plus judges of the Ninth Circuit Court of Appeal when presented with our Petition for Rehearing outlining gross improprieties does not feel the ethics of his profession strongly enough to request a vote on the suggestion for a rehearing en banc?

TABLE OF CONTENTS

	Page
Judgments Below.	1
Jurisdictional Statement	2
Provisions of Law Involved in Case	3
Statement of Case.	5
Reason for Granting the Writ . .	22
Conclusion	23

APPENDIX - Under Separate Cover

A.	MEMORANDUM (JUDGMENT) Ninth Circuit Court.	1
B.	DECISION of the N.L.R.B. . .	5
C.	ORDER Denying Rehearing, Ninth Circuit Court.	94

AUTHORITIES

Cases

NLRB v. Herman Sausage Inc., 275 F2d 229 (5th Cir. 1960) p. 17

Universal Camera Corp. v. NLRB 340 U.S. 474 (1951) p. 19

NLRB v. Vantram Electronics Corp., 580 F2d 921 (1978) 7th Cir. p. 19

NLRB v. Yama Woodcraft Inc., 580 F2d 942 9th Cir. (1978) p. 19

Golden State Bottling Co., v. NLRB 414 U.S. 168 (1973) 9th Cir. p. 18

CONSTITUTION

U.S. Constitution, 5th Amendment, p. 3

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. at 395 29 U.S.C.), Sec. 7, Sec. 8a (1) (5) p. 3, 4.

U.S. Code Title 18, Sec. 1001, p. 9

MISCELLANEOUS

American Bar Association's Code of Judicial Conduct for United States Judges. (in Question)

Ref: Legal Ethics, Wise, Raymond L., 1979 Matthew Bender, Publisher

JUDGMENTS BELOW

ORDER Filed September 15, 1980, U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion that Hearing be en Banc. Not reported

MEMORANDUM Filed July 21, 1980 U.S. Court of Appeals for the Ninth Circuit On Application for Enforcement of an Order of the N.L.R.B., "Enforcement of the Board's order is GRANTED," Not reported.

DECISION of the N.L.R.B. Dated December 13, 1977. Cited: Betra Mfg. Co. and International Association of Machinists and Aerospace Workers, AFL - CIO, District Lodge 93, Local Lodge 504 1978 NLRB, 18, 828, 233 NLRB No. 156 Case # 32-CA-64, December 13, 1977

JURISDICTIONAL STATEMENT

Jurisdiction of this court is conferred by U.S.C. 28-1254 "Cases in the Court of Appeals may be received by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment.
2. The date of filing of the order to be reviewed is September 15, 1980. This is the order denying Petition for Rehearing and Suggestion that Rehearing be en Banc, U.S. Court of Appeals for the Ninth Circuit.

PROVISIONS OF LAWS INVOLVED IN THE CASE

U.S. Constitution, Fifth Amendment:

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.)

(Section 7). Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

The power of the Federal Government over the every day lives of the citizen has become so great in the last few decades that the possibility of being brought to answer by the Government for an infraction of some regulation or law is great. Whereas fifty years ago the possibility of a citizen being called to answer by the "feds" was minimal.

In this case the National Labor Relations Board has exercised their power over the small employer of five to ten employees. We are a local machine shop and foundry operated by the proprietor Mark J. Thomas. This case arose when the employees of the company elected a union to represent them in collective bargaining with the owner. We bargained with the Union for six months. During thus time we offered the union a signed contract

to accept. We had bargained in good faith without deceit, but bargained hard for a contract that we felt just to all. But since this contract did not meet the Union criteria (which seemed to have nothing to do with the employees' opinions of the matter) the Union, instead of exercising the right to strike, thereby bringing pressure on the employer to make a better offer, chose to take another course. They chose to file with the N.L.R.B. Region 20 (which has a reputation for being pro-union) a charge against the employer saying that:

> "Since on or about January 19 1976, the above mentioned Employer, by its officers and agents, by intimidation, threats, espionage, et cetera, and by other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.
>
> On or about January 19, 1976 the above-named Employer, by its officers and agents, refused and continues to refuse to bargain collectively with the authorized

agents (representatives) of International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504, a labor organization chosen by a majority of its employees at its premises at 50 Bellevue Avenue, San Jose, California, for collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

This charge was signed by an officer of the Union and attested to be true. (Volume 1 of Record, page 3). The N.L.R.B. investigated this charge and had the Union file an amended charge to support some of their findings that the pro-union Regional Officer of the Board thought could be made in a case against us. That is to say the Board's representative was not impartial in the investigation but was looking beyond the original charge of the Union. From the beginning we informed the agency investigator of the falsity of the charge and always argued this point in our answers to the subsequent complaint, amended complaint,

administrative hearing and cross examination of the Government witnesses as to the truth or falsity of the charge.

We continued to argue this in our End of Trial Brief, Exceptions to the Board and Its Supporting Brief. Again we brought out this false charge in our appellate brief and oral hearing before the appellate court. As outlined in our Petition for Rehearing, the N.L.R.B. attorney, after returning to the rostrum at the oral hearing to present his closing remarks stated "The Union was the party that refused to bargain at the January 19 meeting." Here we have an admission that the whole proceeding had been based on a charge made by the Union in a fraudulent document filed with the Regional N.L.R.B. office. Knowing the Union affidavit was false, the N.L.R.B. proceeded in the overzealous attempt to let the Union enjoy "the fruits of

bargaining." They decided to go ahead with prosecution in support of the Union. The proper proceeding of the Board, when they found out that the original charge was false, would have been to act as stated at the bottom of the Charge Against the Employer, form N.L.R.B. - 501. They should have instituted proceedings with the Justice Department to bring charges for wilful false statement under U.S. Code Title 18, Sec. 1001.

Where is equity and justice in this case if the Government is allowed to approach the bar with unclean hands?

This was only the start of harrassment by the N.L.R.B. To save the Court reading time, we will simply list the abuses of truth, fairness, misinterpretation of statutes, false listing of citations, etc. that transpired in this case. They are basically in chronological order:

1. At a meeting with the Regional General Counsel, I was informed that the charges had merit and they would proceed with a complaint unless:

   1.a The Regional General Counsel threatened me with "years of labor unrest" if I did not enter into a settlement agreement.

2. After signing the Settlement Agreement, the Regional Compliance Officer tried to impose on me greater burdens than agreed to.

3. The Compliance Officer quoted me law so as to deprive me of an important right in the bargaining process.

4. Later on I found the Union had been quoted the statute in full, giving them notice of the right

that bargaining parties were not required to make concessions.

5. The Compliance Officer, by her reporting requirement in excess of the Settlement Agreement injected herself into the bargaining process.
6. She redressed me in a letter for not capitulating to her excess reporting requirement and sent a copy to the Union which they used against me in front of the employees.
7. The Compliance Officer, in her communications tried to dictate the course of bargaining clauses to the Union's benefit.
8. The employees, after the certification year had expired, petitioned the Regional Director for a decertification election.

9. They were turned down because of the Settlement Agreement, which was between me and the Union and should not have affected their rights under the statute. The N.L.R.B. boldly points out in the beginning of all the N.L.R.B. NOTICES that they will do nothing to interfere with the employees' rights.

10. Our employees appealed the Regional Director's decision. The Board replied by saying that "insufficient grounds have been alleged" to grant them these rights. (These rights of employees are, of course, the whole purpose of the Act.

11. We complained to the President, Senators, etc. concerning these abuses by the Compliance Officer

and the Regional Director. The letter to the President was forwarded to the Board to investigate the matter. They whitewashed it over with the excuse that these errors were unintentional. We were later supplied with proof that the misleading quote was deliberate.

12. Many false statements were made in the complaints issued.
13. A misleading letter was given to me to get me to sign a formal settlement agreement.
14. The A.L.J. made ex parte communication with the compliance officer before the trial.
15. The A.L.J. denied me witnesses over my objection.
16. He seemed to be in a hurry to end the trial that night, justice be damned.

17. The A.L.J. acted as an advocate for the N.L.R.B. when he asked the Board attorney what remedy he was going to ask for and then suggested a severe one.

18. He also acted as an advocate when he extracted from the evidence matter that was damaging to me but about which no charge was filed as the Union had agreed to the granting of a wage increase at the start of the bargaining sessions.

19. The Board's attorney allowed his witness to perjure himself on the stand in relation tothe original charge.

20. The Union's agent perjured himself in cross-examination concerning the January 19 meeting.

21. The Board's attorney had his witness quote things out of

context so as to give different meaning to my statements.

22. He also quoted these statements out of context in his close of trial brief.

23. The Board's briefs and pleading are FULL OF CASES QUOTED so as to construe meaning favorable to their cause.

24. The Board, in their findings concurred in all these deceitful tactics, in spite of my pleading citing all these abuses. Even when I reiterated these abuses in my request for an oral hearing which was denied. I thereby had no opportunity of confronting the Board personally with these foul deeds.

After the Board's decision, we had a year plus of rest from the N.L.R.B. They

then contacted me. Because I would not comply with their unlawful decision, they went ahead with an enforcement proceeding before the Ninth Circuit Court of Appeals.

We pointed out in our brief to the Appeals Court all of the foregoing inequities and harrassments. We also pointed out the fact that the Executive Secretary of the N.L.R.B. CERTIFIED that the "documents annexed hereto constitute a full and accurate transcript of the entire record and proceeding by the said Board." Yet we had to submit eighty some pages of pleadings; both ours and theirs to complete the pleadings and show our side of the case. The N.L.R.B. had presented mostly documents which showed their biased view and eliminated most of our complaints about their deceitful conduct.

In addition, we were later allowed by the appellate panel to submit a large appendix (R1b) that presented the employees'

petitions for decertification to the Board, which the N.L.R.B. in their complaint maintained did not exist. Included in this volume (R1b) was the letter concerning the deceitful quoting of the law and various other letters and documents substantiating my complaints. Some of these documents would have been presented at the trial if my witnesses had been allowed. Others would have been presented to the Board, if they had allowed me the oral hearing requested.

We further brought forth our defence of the charge of bargaining in bad faith. We also brought out the many out of context quoting of cases in their appellate brief. An example is their citing of N.L.R.B. v. Herman Sausage, Inc. 275 F 2d, 229 (5th Cir. 1960) 221, 231, 232. If this case had been quoted more fully, it would have turned the tide of this citation in our direction. The N.L.R.B. attempted

to use it adversely against us by deceitful use of the text.

I would like to point out that the Board attorney made a libelous statement describing me as "disingenuous" in his brief. He did not even know me.

The hearing in the Appellate Court went against me. The judges bowed to the expertise of the Board (which, in this case, would be more properly called the tyranny of the experts). In their Memorandum, The Appeals Court practices some of the same tricks used by the N.L.R.B. in citing cases. Quotations are carefully excerpted to suit their purpose, not allowing the full meaning of the case cited to be revealed. In fact, one of the citations was so far off base as to not apply to the case. This was brought out in our petition for rehearing. Their citation of Golden State Bottling Co. v. N.L.R.B. 414, U.S. 168 (1973) 9th Cir. is one which is about

a back pay issue! The source citation as to N.L.R.B. v. Yama Woodcraft Inc. turns out to be N.L.R.B. v. Vantram Electronic Corp. 580 F2d 921 (1978) 7th Cir. In this case enforcement was denied and it was said that the Board exceeded its remedial powers. This is certainly the decision that should have been reached in our case. But in addition, the Court should have assessed sanctions against the Board and its attorney and awarded us damages for the flagrant treatment we received at the Board's hands.

The one citation they got straight was Universal Camera Corp. v. N.L.R.B. 340 U.S. 474 (1951). In this case the judges held "that where the findings and conclusions are supported by substantial evidence we are not permitted to substitute our judgment for that of the Board." The Appellate Court stops quoting at this

point because this much of the quotation supports their approach to justice. BUT if we continue reading in this case, we find that the Supreme Court's intent was to cause the Appellate Court to look more carefully at the administrative procedures. The Court held on page 490 (5): (My underlining)

> "We conclude, therefore, that the Administrative Procedure Act and the Taft Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeal. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the

> testimony of witnesses or its informed judgment on matters within its special competence or both."

In my petition for rehearing en banc I requested the whole appellate court to take cognizance of this admonition. If the appellate court had not abdicated their conventional judicial function, I would have been granted a rehearing en banc. The capricious and tyrannical prosecution of the N.L.R.B. would have been properly condemned. Both this Court and I would have been spared the necessity of the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The granting of this Writ is of the greatest importance to the citizenry of the United States in order to uphold the traditions set forth by the founders of this great nation; that the Judicial Branch of the Government shall be the protector of the freedoms envisaged in the Declaration of Independence. Paramount among the many ideas of freedom was the thought of having a system of government that would check the tyranny of the governmental processes. As the writers of the Constitution well understood, the total record of human history contained many instances of tyrannical rule, corrupt governments, and the decay of governments because of a self-serving bureaucracy. They themselves had experienced the tyranny of the English King and his agents.

By renouncing honesty in the use of

power, bureaucracies became tyrannical and attempted to destroy some of the citizenry by championing causes, by use of distorted facts, false pleading, despotic administrators, special courts and lawyers who act for the cause - ethics, the public, and the unfortunate defendant be damned, using all the deceitful tricks of his trade to win the Government's case and cause.

In conclusion I wish to relate a statement I once read, that justice is frequently done when the Government loses a case. The harrassment of us by the N.L.R.B., including the refusal of the Appeals Court to protect our right of fair trial and due process demands that we be granted this Writ of Certiorari. The right of due and fair process required by a citizen when confronted by his Government must be well established in a new decision by the Supreme Court

of the United States - the institution the public respects as the palladian of fairness, truth and justice.

Respectfully submitted,

Mark J. Thomas, Petitioner

Dec. 12, 1980
Dated

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years of age, a resident of Santa Clara County, and not a party to the within action. My business address is 50 Bellevue Avenue, San Jose California 95110. I served three copies of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing said copies in an envelope which was then sealed and postage fully prepaid thereon, and was, on December 12, 1980 deposited in the United States mail at the United States Post Office, 105 N. First Street, San Jose, California to the following persons:

Elliott Moore, Deputy Associate
General Counsel
National Labor Relations Board
1717 Pennsylvania Ave.
Washington, D. C. 20570

Solicitor General
Department of Justice
Washington, D. C. 20530

That there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury, that the foregoing is true and correct.

December 12, 1980
Dated: December 12, 1980

Suzanne D. Thomas

Supreme Court, U.S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

80-1140

NO._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARK J. THOMAS
~~BETRA MANUFACTURING COMPANY~~
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. THOMAS,
REPRESENTING SELF, OWNER

BETRA MANUFACTURING COMPANY
50 BELLEVUE AVENUE
SAN JOSE, CALIFORNIA
95110

408-292-9312

INDEX TO APPENDIX

		Page
A.	MEMORANDUM (JUDGMENT) Ninth Circuit Court.	1
B.	DECISION of the N.L.R.B. . . .	5
C.	ORDER Denying Rehearing, Ninth Circuit Court.	94

MEMORANDUM DECISION
FILED JULY 21, 1980
NO. 79-7210

(Stamped)
July 21, 1980
Richard H. Deane, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BETRA MANUFACTURING COMPANY
Respondent.

No. 79-7210

MEMORANDUM

On Application for Enforcement of an Order of the National Labor Relations Board

Before: ANDERSON and FLETCHER, Circuit Judges, and ZIRPOLI, District Judge*.

The International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93 and Local

*The Honorable Alfonso J. Zirpoli, Senior United States District Judge, District of Northern California, sitting by designation.

Lodge No. 504 (the Union) filed an unfair labor practice charge against Betra Manufacturing Company of San Jose, California, alleging a refusal to bargain in good faith after a representation election.

Based on the evidence adduced at a hearing, the administrative law judge (ALJ) found that Betra had violated Sec. 8(a) (5) and (1) of the National Labor Relations Act (Act). The Board adopted the ALJ's findings and affirmed the decision. 233 NLRB No. 156. The NLRB seeks enforcement of its order.

Betra's owner, Mark Thomas, proceeding in propria persona, contends that enforcement should be denied because of (1)

insufficient evidence, (2) bias of Board officials, (3) procedural irregularities before the ALJ, and (4) the Betra employees' desire for a decertification election. Mr. Thomas admits that he did not comply with the Board's order.

We find it unnecessary to set forth and critically examine the facts. They are set forth at length in the ALJ's decision. It suffices to say that our review of the entire record convinces us that the Board was amply justified in finding and concluding that Betra, by its overall conduct in lengthy and somewhat bitter contract negotiations, refused to bargain in good faith with the Union. These findings and conclusions, including that of improper motivation on the part of Mr. Thomas, are supported by substantial evidence, and we are not permitted to substitute our judgment for

that of the Board. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Yama Woodcraft, Inc., 580 F2d 922, 944 (9th Cir. 1978).

We have carefully examined Mr. Thomas' other contentions and find them to be without merit.

The Board did not abuse its broad discretion in formulating the remedial order. See. e.g. Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

Enforcement of the Board's order is GRANTED.

I certify that the foregoing is a true typed copy of the original documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 1980 at San Jose, California

Mark J. Thomas, Petitioner

233 NLRB No. 156

FPM
D-3257
San Jose, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Decision dated
December 13, 1977

BETRA MANUFACTURING COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL--CIO, DISTRICT LODGE NO. 93, LOCAL LODGE NO. 504

Case 32--CA--64 (formerly 20--CA--11075)

DECISION AND ORDER

On July 28, 1977, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act,

as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the Administrative Law Judge[2/] and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge for the reasons fully stated by him that Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union. The General Counsel contends that the Administrative Law Judge erred in failing to extend the certification year, and in failing to provide an extraordinary remedy.

1/ Respondent has excepted to certain creditibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule

an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Drywall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings. 2/ Respondent has moved for dismissal of the complaint herein on various constitutional grounds including, inter alia: the Board's failure to appoint counsel for Respondent; the failure for a trial by jury in a Federal court; the impossibility of a fair judgment due to administrative bias; and the Board's lack of jurisdiction. These motions are denied as lacking in merit. As to the constitutionality of the National Labor Relations Act and this Board's procedures thereunder, we refer Respondent to N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

With respect to the certification year, we agree with the General Counsel's contention. We note that the Union was certified on May 16, 1975, and, as stated by the Administrative Law Judge, Respondent has failed since that time to engage in good-faith bargaining. We therefore find it appropriate to extend the certification year for 1 year from the date when Respondent begins to bargain in good faith with the Union. Inasmuch as the unit employees have been deprived of the benefits of the certification year due to the overall bad faith exhibited by Respondent during the course of negotiations, this extension will insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for a period provided by law. Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Southern Paper Box Company, 193 NLRB 881 (1971).

With respect to the General Counsel's

request for a remedy like that ordered in Tiidee Products, Inc., 194 NLRB 1234 (1972), we find that the facts herein do not warrant a full Tiidee remedy. In the Tiidee case, we noted the need to keep crowded court and Board dockets free from frivolous litigation and ordered an employer who refused to meet and negotiate with the certified representative of its employees to reimburse the Board and the union for their costs and expenses incurred in the investigation, preparation, presentation, and conduct of the case. Although we find all of Respondent's contentions to be wholly lacking in merit and/or unsupported by the record, we cannot say that all of its defenses were patently frivolous. Therefore, we deem it inappropriate to apply the requested monetary remedy awarded in the Tiidee case.

Contrary to our dissenting colleague, we do not find this case to warrant the extraordinary remedy requested by the General Coun-

sel. In South Hoover Hospital, 196 NLRB 1077 (1972), a case wherein a Tiidee remedy was requested and denied, we approved the following language of Administrative Law Judge Richard D. Taplitz:

> I am reluctant to recommend such and order where, as here, a small employer's first violation of the Act may be attributable to its gross ignorance of the labor laws rather than to its calculated design to subvert them. I shall, therefore, refrain from recommending such an order.....(196 NLRB at 1081.)

We find the foregoing considerations are equally applicable to Respondent here. Accordingly, we would likewise refrain from imposing the monetary remedy requested.

On the other hand, we find that certain other remedial measures devised in Tiidee are appropriate in the instant case. The Administrative Law Judge found, and the record amply

demonstrates, that Respondent has failed, during the course of 22 negotiating sessions continuing over a 17-month period, to engage in the good-faith bargaining efforts required by Section 8(a)(5) and 8(d) of the Act, even after voluntarily entering into a settlement agreement in which it agreed to do so. Respondent has thereby displayed a total disregard for the rights of its employees to enjoy the fruits of their representation by the good-faith negotiation of a contract. Thus, Respondent has effectively prevented its employees from realizing the benefits of their election choice. Merely to refer the parties back to the bargaining table, without more, is not an adequate remedy.

Under these circumstances, we conclude that some additional measures are necessary to assure the employees a continued and informed communication with their elected representative. Therefore, we shall order that Respondent, in addition to the remedy ordered

by the Administrative Law Judge, mail the attached notice to all unit employees, grant the Union reasonable access to its bulletin boards, and make available to the Union a list of the names and addresses of all unit employees to be kept current for a period of 1 year.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Betra Manufacturing Company, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Upon request, bargain collectively in good faith with the above-named labor or-

ganization as the exclusive representative of all Respondent's employees in the appropriate unit described below and, if an agreement is reached, embody such understanding in a signed agreement. Respondent's obligation to bargain with the Union shall extend for 1 year from the date it first commences to bargain in good faith. The unit is:

> All employees employed by the Employer at its San Jose, California facility; excluding professional employees, salesmen, guards, office clerical employees, and supervisors as defined in the Act."

2. Insert the following as paragraphs 2(b), (c), and (d) and reletter the subsequent paragraphs accordingly.

"(b) Mail a signed copy of the attached notice marked "Appendix" to each of its employees in the above-described unit immediately upon receipt thereof from the Regional

Director for Region 32.

"(c) Upon request of the Union, made within 1 month of the date of this Decision, immediately grant the Union and its representatives reasonable access, for the period of the collective-bargaining negotiations, to its bulletin boards and all places where notices to employees are customarily posted.

"(d) Upon request of the Union, made within 1 month of the date of this Decision, make available to the Union a list of the names and addresses of all unit employees currently employed and keep such list current for a period of 1 year thereafter.

3. In paragraphs 2(e) and (f), substitute the words "Region 32" for "Region 20."

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 13, 1977

John H. Fanning, Chairman

(SEAL)

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MURPHY, dissenting in part:

I agree with my colleagues' findings and conclusion that Respondent violated Section 8(a)(5) of the Act by engaging in surface bargaining without any real intent of reaching a contract accord. However, unlike my colleagues, I agree with the General Counsel that something more than our usual remedial order is necessary in the circumstances here, and I would therefore grant his request for an extraordinary remedy. Where an employer continually circumvents the possibility of finalizing extended contract negotiations by insisting on contract provisions which would effectively emasculate the Union as the bargaining representative of its employees, particularly after it has failed to comply with the terms of an earlier settlement agreement, I would find an extraordinary remedy to be warranted.[3/]

3/ In Crystal Springs Shirt Corporation, 229 NLRB No. 10 (1977), a case wherein an employer similarly delayed contract conclusion through surface bargaining, I indicated that I would grant the union reimbursement for expenses incurred as a result of the respondent's unfair labor practices. I would likewise do so here.

The Administrative Law Judge, in his findings adopted herein, concluded that Respondent entered into contract negotiations with an intent to subvert the bargaining process, announced to the Union that such was its intention, and, by its conduct in the ensuing 22 meetings with the Union, insured the intended result. At the initial bargaining session where it announced that it would give up no prerogatives which were management's prior to the Union's certification, and that the end result would be the same as before the Union was elected, Respondent made manifest its intention to negate the election choice of its employees. It then proceeded in a 17-month attempt to do so.

Respondent was consistent throughout the bargaining in insisting on nonmandatory subjects and on provisions inherently repugnant to any union seeking responsibly to represent the employees. Such items included a provision requiring the Union to post a performance bond

to assure payment of liquidated damages in the event of breach of a no-strike clause, a provision automatically invalidating the contract if there were any change in the Union's constitution, bylaws, or affiliation, and a provision likewise invalidating the contract if there were any change at all in Respondent's ownership. Respondent additionally insisted on items which are in direct conflict with the bargaining obligation. Thus, throughout the 22 bargaining sessions Respondent continued to insist on such contract provisions as, inter alia, the unilateral right to change wages by 10 percent, the unilateral right to change virtually all terms and conditions of employment and work rules, and a provision requiring the Union to prove its majority status each year before entering into new contract negotiations. The impact of such provisions would essentially be to overrule the Board's certification of the Union as the employees' duly selected bargaining representa-

tive. Further, by entering into a settlement agreement on April 27, 1976, with which it subsequently failed to comply, Respondent both delayed remedial action against it and denied its employees the benefits of their bargaining representative for an additional year.[4/]

In denying the General Counsel's request for a Tiidee remedy, the Administrative Law Judge opined that Respondent's flagrant unfair labor practices would not be adequately remedied by the customary imposition of a bargaining order and the posting of a notice. He found, however, that the Tiidee case is factually distinguishable and that no other Board precedent exists to support such a remedy. My colleagues on the majority, by adopting the Administrative Law Judge's

4/ The Regional Director withdrew approval of the settlement agreement on October 21, 1976, and issued an amended complaint on March 3, 1977.

denial of an extraordinary remedy for lack of precedent, thereby again fail to create such a precedent. I would not.

While my colleagues recognize that merely sending the parties back to the bargaining table is not an adequate remedy in the circumstances here, they nonetheless "deem it inappropriate to apply the requested monetary remedy awarded in the Tiidee case." Yet this Respondent has depleted the Union's time and financial resources, as well as expended the time of Federal mediators and this Agency, in its duplicitous bargaining charade. The depletion of such resources, in conjunction with the denial of employee rights and the resultant weakening of the newly selected Union's position vis-a-vis the employees it represents are, in my view, at least as egregious as refusing to meet with the union at all as did the respondent in Tiidee. In light of Respondent's demonstrated hostility toward the Union and the

concept of collective bargaining, and its failure to comply with the previous settlement agreement, I do not think it likely that Respondent will return to the bargaining table and bargain in good faith without some more compelling remedy. Therefore, in order to more fully effectuate the policies of the Act, I would grant the remedy requested by the General Counsel.[5/]

Accordingly, in addition to the remedial provisions granted by the majority, I would require Respondent to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, presentation, and conduct of the case. I would also require Respondent to reimburse the Union for its costs incurred during the

5/ This is not to say that every surface bargaining case would justify the imposition of an extraordinary remedy. However, in this case and in the circumstances described above, I think it is appropriate.

course of its collective-bargaining negotiations with Respondent, as requested by the General Counsel.

Dated, Washington, D.C.

December 13, 1977

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

You will recall that we have previously posted a notice similar to this one wherein we made a commitment to you to obey the law. After a formal hearing at which all parties had an opportunity to present evidence and state their positions, it has been decided by the National Labor Relations Board that we did not live up to our promises contained in the first notice, and that we have continued to violate the National Labor Relations Act. Therefore, we have been ordered to post this notice. We are hereby ordered to advise you that we intend to honor the commitments made to you in this notice. In the event that we do not, we may thereby become subject to substantial monetary fines and other sanctions imposed by a United States Court of Appeals until our obligation to you

under the law is satisfied.

The Act gives all employees the following rights:

> To engage in self-organization
> To form, join, or assist unions
> To bargain collectively through representatives of their own choosing
> To engage in activities together for purposes of collective bargaining or other mutual aid or protection
> To refrain from any or all such activities, except to the extent that the employees' bargaining representative and an employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain collectively in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504, as the exclusive representative of our employees in the appropriate unit described below concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT insist that the Union post a security bond as a condition to our entering into a collective-bargaining agreement with the Union.

WE WILL NOT insist to the point of impasse on a proposed management rights clause or other clauses granting us the unilateral right to determine hours of work, working conditions, merit increases, and other terms and conditions of employment in the unit described below.

WE WILL NOT insist to the point of impasse on a collective-bargaining contract clause which would nullify the entire collective-bargaining contract clause which would nullify the entire collective-bargaining agreement in the event of a change in the Union's affiliation, constitution, or bylaws.

WE WILL NOT insist to the point of impasse on a contract clause granting us the unilateral right to make and change work rules affecting employees' condition of

employment.

WE WILL NOT otherwise engage in surface bargaining or other collective bargaining not in good faith, without real intention to reach a meaningful collective-bargaining agreement with the Union.

WE WILL, upon request, meet and bargain collectively in good faith with a duly authorized representative of the Union concerning our employees' rates of pay, wages, hours of employment, and, if an understanding is reached, embody such understanding in a signed agreement. Our obligation to bargain with the Union shall extend for 1 year from the date we first commence bargaining in good faith. The unit is:

> All employees employed by the Employer at its San Jose, California facility; excluding professional employees, salesmen, guards, office clerical employees, and supervisors as defined in the Act.

WE WILL mail a signed copy of this notice to all our employees in the appropriate bargaining unit.

WE WILL, upon request, grant the Union reasonable access to our bulletin boards during contract negotiations.

WE WILL, upon the request of the Union, immediately give to the Union a list of the names and addresses of all our employees in the appropriate bargaining unit, and WE WILL keep the list current for a period of 1 year.

BETRA MANUFACTURING COMPANY
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions

may be directed to the Board's Office, Clorox Building, 7901 Oak Port Street, Oakland, California 94621, Telephone 415/ 632-7202.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

DECISION DATED JULY 28, 1977

BETRA MANUFACTURING COMPANY

and Case No. 20-CA-11075

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
DISTRICT LODGE NO. 93, LOCAL LODGE NO. 504

Jonathan J. Seagle, Esq. and Joseph Lumsdaine, Esq., San Francisco, Calif., for the General Counsel.
Mark J. Thomas, San Jose, Calif., for Respondent.

DECISION

Statement of the ase

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in San Jose, California, on March 17, 18 and April 4, 1977. The initial charge was filed on February 4, 1976, by International Assoc-

iation of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504 (herein called the Union). An amended charge was filed by the Union on March 3, 1976. The initial complaint, issued March 31, 1976, alleges violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein called the Act). On April 27, 1976, the Regional Director for the Twentieth Region of the National Labor Relations Board (herein called the Board) approved an all-party settlement agreement and withdrew the complaint and notice of hearing. Thereafter, on October 21, 1976, the said Regional Director issued an Order Withdrawing Approval of Settlement Agreement, Reinstating Complaint and Notice of Hearing, as a result of Respondent's alleged failure to discharge its obligations under the settlement agreement. On March 3, 1977, an amended complaint was issued, alleging violations of Section

8(a)(5) and (1) of the Act. Respondent's answers to the complaint and amended complaint, duly filed, deny the commission of any unfair labor practice.[1/]

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and from Respondent.

1/ Respondent's answer to the amended complaint contains a request for appointed counsel as a result of professed inability to afford counsel; for a trial by jury; for a trial by a federal court; for direct appeal from the Administrative Law Judge's decision to a federal court rather than to the Board; and for dismissal of the matter as a result of failure to be accorded a speedy trial. These requests, renewed by Respondent at the hearing, were denied. Thereafter, Respondent filed a motion with the United States District Court for the Northern District of California seeking relief from certain adverse rulings of the Administrative Law Judge, namely the failure to appoint counsel and grant Respondent a trial by jury. On April 8, 1977, the Court issued its judgment summarily denying Respondent's petition. On June 30, 1977, Respondent filed with the Court both a Notice of Appeal and a Motion Requesting Extension to File Late Notice of Appeal. These documents are currently pending before the Court, no disposition thereof having been made to date.

Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a sole proprietorship engaged at its San Jose, California facility in the business of manufacturing non-ferrous castings and machine metal parts. Record evidence establishes that in the course and conduct of its business operations during calendar year 1975, Respondent sold goods and supplies valued in excess of $50,000 to firms within the State of California, which firms, during calendar year 1975, met the Board's applicable direct outflow jurisdictional standards for the assertion of jurisdiction. I therefore find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It was stipulated by Respondent at the hearing that the Union is, and has been at all times material herein, a labor organization with the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Issue

The principle issue raised by the pleadings is whether Respondent, by its overall course of conduct in contract negotiations, has refused to bargain collectively in good faith with the Union, the certified collective-bargaining representative of Respondent's employees, concerning wages, hours of work or other terms and conditions of employment.

B. The Facts

1. Background

Respondent is a sole proprietorship engaged in the business of manufacturing non-ferrous castings and machine metal parts, with its office and place of business located

in San Jose, California. Respondent's customary employee complement totals 6 to 8 employees. On April 11, 1975, the parties entered into a Stipulation for Certification upon Consent Election in Case No. 20-RC-12685, and pursuant thereto a representation election was held on May 8, 1975, at which time a majority of Respondent's employees in the agreed upon unit[2/] designated and selected the Union as their exclusive collective-bargaining representative. Thereafter, on May 16, 1975, the then Acting Regional Director certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the aforementioned appropriate unit.

2. The Negotiations - June 9, 1975 Through January 19, 1976

2/ All employees employed by Respondent at its San Jose, California facility, excluding professional employees, salesmen, guards, office clerical employees, and supervisors as defined in the Act.

On May 23, 1975, Union Business Representative John DeCarli sent Respondent a letter requesting the commencement of negotiations, and enclosed as an initial proposal the then current 1974-1977 Independent Machine and Manufacturing Agreement between the Union and approximately 100 employers in Santa Clara County, the county in which Respondent's facility is located. Throughout the entire course of bargaining DeCarli, for the Union, and Mark J. Thomas, for Respondent, remained the principal spokesmen for the parties. Other business representatives, sometimes accompanied by unit employees, also attended the bargaining sessions on behalf of the Union, while Respondent's foreman would often attend negotiations on behalf of Respondent. Various other unit employees would also attend negotiations, however, the record does not disclose whether their interests were specifically aligned with one party or the other, or whether they were merely im-

partial observers. The first set of negotiations, prior to the settlement agreement, commenced on June 9, 1975, and consisted of 13 negotiating sessions as follows: June 9 and 16, July 14 and 28, August 5, 18 and 25, September 5 and 24, and October 6 and 21, 1975, and January 5 and 19, 1976.

DeCarli commenced the June 9, 1975 session by asking Thomas whether he had looked over the aforementioned proposed Independent Machine and Manufacturing Agreement previously submitted to Respondent. Thomas replied that he had looked it over "and it stinks," adding that, "You will never get me to sign any contract." The tenor of negotiations having thus been immediately established, DeCarli proceeded to engage Thomas in a discussion of each contract proposal seriatum.

Thomas objected to the proposed intro-

ductory paragraph[3/] and purpose of agreement,[4/] stating that there was no need for such language, and quickly dismissed the proposed standard union security clause with the remark, "You will never get me to sign a contract with the union security clause in it." The Union's wage proposal contained hourly rates of pay for various job classifications. Thomas objected to this stating that he would be the sole judge of the wages which Respondent would pay. Regarding an apprenticeship training provision whereby the employer would give employees an opportunity to acquire additional skills thus qualifying them for higher pay

---

3/ "Agreement by and between _____, party of the first part, hereinafter referred to as the Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 93, party of the second part, hereinafter referred to as the Union."

4/ "Purpose of Agreement. The purpose of this Agreement is to promote continuity of friendly relations between the Employer and the Union and to define wages, hours and conditions of employment for employees covered by this agreement."

classifications, Thomas expressed his opinion that such a provision "stinks" and that the Union should provide all such training. Thomas further stated, when confronted with the respective applicable proposals, that he would not agree to contract seniority provisions as he did not philosophically believe in the principles of seniority; that he may or may not provide more than 2 weeks vacation with pay after 10 years of service depending upon the particular employee in question; that although he currently provided his employees with the paid holidays enumerated in the contract, he did not want such a clause included in the contract and that if a particular employee did not deserve a paid holiday Thomas retained the right to refuse such payment; that the contract's Union Activity clause, assuring non-discrimination for engaging in union activity and additionally containing provisions regarding Respondent's recognition of shop stewards,

was unacceptable; that he would allow authorized business representatives access to the plant for the purpose of carrying out the terms of the agreement, if at all, only during employees' lunch breaks; and that the Union would not be given bulletin board privileges at the plant.

During the discussion of the proposed management rights clause contained in the Union's proposal Thomas stated that he desired certain non-unit employees, including the plant foreman, to perform unit work. When DeCarli stated that they would thereby have to join the Union, Thomas stated, "there is nobody in my plant that is going to join the Union." The remainder of the contract provisions were discussed, Thomas refusing to agree to any item. In addition, Thomas stated that he was interested only in a 1-year contract. DeCarli requested that Thomas submit counter proposals and asked for a list of Respondent's employees along with

their classifications and rates of pay.

The next meeting was held on June 16, 1975. The Union's proposals were again discussed, Thomas agreeing to none of them. Thomas furnished the Union with a list of Respondent's current employees and their hourly rates of pay. In addition, Thomas made wage and classification proposals, establishing a "wage range" for each classification varying between $1 to $2 per hour. Thomas stated that he would unilaterally determine the specific rate of pay for each employee within the given range.

The next meeting was held on July 14, 1975. At this meeting Thomas furnished DeCarli with a written list of factors which Thomas would consider in unilaterally establishing an employee's wages within the aforementioned wage range, namely, quality of work, quantity of work, dependability, job knowledge, cooperation, initiative, attitude, safety habits, attendance, working conditions,

learning ability, adaptability, physical conditions, and personal habits. DeCarli suggested that the services of the Federal Mediation and Conciliation Service (FMCS) be utilized by the parties during further negotiations, but Thomas saw no need for such intervention at that time.

At the July 28, 1975 meeting Thomas handed DeCarli a list of the current employees, then six in number, their wage rates and dates of hire. This document, when compared with the wage rates furnished the Union on June 16, shows that three employees received a $.25 per hour wage increase between June 16 and July 28.[5/] Further, Thomas submitted a proposed management rights clause[6/] which, in effect, operated as a com-

5/ There is no complaint allegation in this regard.

6/ Additions to this clause were made by Thomas during the course of bargaining, the final clause appearing in the document attached hereto as "Appendix A."

plete retention of virtually all matters pertaining to employees' wages, hours and working conditions as sole prerogatives of management, which matters, according to the proposal, would not be subject to a contract grievance procedure. Thomas stated that this clause was not yet complete, and that he intended to make additions to it as bargaining progressed. Thomas agreed at this meeting to a union-proposed "non-discrimination" clause providing for mutual cooperation in establishing and maintaining equal employment opportunity and affirmative action programs.

At the next meeting, August 5, 1975, Thomas made additional proposals: an introductory paragraph stating the names and addresses of the parties to the agreement; an overtime proposal defining the work week and providing for time and one-half after 40 hours of work during the work week; and a revised management rights clause which specified nine additional areas as "unilateral

rights" of management.

The meetings of August 18 and 25, 1975 were apparently of brief duration and uneventful. Thomas was unable to attend the August 25 meeting, and DeCarli met with Respondent's foreman on that occasion. The next meeting was held on September 5, 1975. Thomas handed DeCarli an illegibly typewritten vacation proposal that had to be read through a mirror. DeCarli pointed out this difficulty to Thomas and Thomas treated the matter as a joke stating something to the effect that it could be deciphered. DeCarli then took the proposal to the restroom and read it with the use of the restroom mirror.[7/] DeCarli stated his belief that Thomas was engaging in stalling tactics and suggested the services of a federal mediator.

7/ While Thomas, at the hearing, stated that the printing had been inadvertantly reversed as a result of the carbon being incorrectly inserted in the typewriter, he offered no explanation for failing to offer DeCarli the use of the original.

At the next meeting, September 24, 1975, Thomas handed DeCarli a proposal for a complete contract and stated that the Union had to accept it in its entirety by October 5, 1975, giving no reason to DeCarli for this demand. Thomas said he had changed his mind about his prior proposals, and that they had been superseded by the current proposed contract. During discussions of Respondent's proposal, which contained no contract grievance procedure, Thomas acknowledged that the Union had the right to take all grievances to "the proper courts." However, DeCarli objected to this verbal proposal and insisted upon an appropriate grievance procedure. Regarding Respondent's management rights proposal, Thomas added two additional unilateral rights of management and stated that the management rights clause could be used to nullify any section of the contract. Respondent's proposal included an "open shop" provision; a provision specifying that classification of

employees and their wages would be determined by management based on merit within wage ranges varying between $1 and $3 per hour; a provision that all wage rates may be lowered by management 10 percent due to business conditions or the competitiveness of the labor market upon giving the Union and the employees 10 day's notice; a no strike-no lockout provision, with liquidated damages of $50 per day per employee should this provision be breached; a provision whereby if Respondent's "ownership" changes in any respect the contract becomes null and void; a provision nullifying the contract if there is any change in the Union's constitution, by-laws, or affiliation; and a proposed 1-year term of agreement.

The Union voiced its objection to the $50 per employee liquidated damages provision in the event of a strike or work stoppage and said the Respondent would have to go to court to collect such damages. Regarding the ownership clause, DeCarli asked Thomas whether, if

Thomas sold, for example, 1 percent of the company to his son or foreman, this would constitute a change in ownership of sufficient magnitude to set aside the contract. Thomas stated that DeCarli's interpretation was accurate, and also said that any change in the IAM Constitution, under which the Union operates, would nullify the contract.

At the October 6, 1975 meeting, Thomas withdrew the Respondent's contract proposal of September 24, 1975, for the reason that it had not been accepted by the requisite deadline, and submitted a new contract. Once again Thomas imposed a new deadline, giving the Union until October 16, 1975, to accept the contract in its entirety, and stating that no section thereof could be changed or even discussed. DeCarli asked Thomas about the language discussed at the previous meeting regarding the Union's right to take any grievance to an appropriate court, which language was absent from the current proposal, and

Thomas stated that such language was no longer being proposed. Thomas had deleted the vacation section which appeared in Respondent's prior proposal and said that this item would be handled under "work rules."[8/] Similarly, Thomas stated that the matters of holidays and attendance requirements, also not included in Respondent's proposal, would be subject to the work rules concept and would therefore be outside the contract.

Respondent's October 6, 1975 contract proposal, in addition to the liquidated damages provision contained in the preceding proposal, contained a demand for the Union's

---

8/ The basis of Respondent's work rule concept was that Respondent wanted the unilateral right to institute and modify work rules and that such rules would not be included in or contemplated by the collective-bargaining agreement. Thomas apparently believed that work rules would be defined as any matter whatsoever, including any item concerning employees' wages, hours and conditions of employment.

posting of a $10,000 security bond.[9/] DeCarli said the Union would never post a security bond, and again asked that Thomas agree to the services of a federal mediator, Thomas apparently agreeing to such request.

The next meeting was held on October 21, 1975. A federal mediator was present. Thomas announced that Respondent's October 6, 1975 proposal was no longer on the table as the Union had not signed it by the required date. Thomas further stated that as he intended to never agree to any union proposals, there remained, at the time, no proposals from either party on the table warranting

---

9/ The applicable proposed contract language is as follows: "Since, at the meeting of September 24, Dwight Reed of the Union negotiating team stated that we would be required to sue to collect any money due under this section it is therefore required that the Union deliver at the time of the contract signing a bond in the amount of $10,000 to be paid to Betra Mfg. Co. In the event that within 10 days after demand is made for payment and it is not paid, the bonding company will pay the amount required within 10 additional days."

further discussion. In an effort to make some initial progress, DeCarli withdrew the Union's proposals on sick leave, dental plan, and pension plan, and stated that such contract items would not thereafter be sought by the Union. Thomas did not respond. DeCarli said that the Union was available and willing to meet with Respondent at any time on any day, and Thomas seized upon this statement and retorted, "Okay, we will meet New Year's day." The Union felt compelled to agree, but the meeting date was later changed to January 5, 1976, apparently by FMCS.

At the January 5, 1976 meeting, also attended by the federal mediator, Thomas announced that he had no proposals to make and stated that he had told his employees that although they voted for union representation there would be no changes whatsoever in employees' working conditions or anything else as a result of bargaining with the Union.

Again at the next meeting, January 19,

1976, Thomas said that he had nothing to offer or propose, that he would never accept any union proposals, and that future meetings would not be productive but rather would occasion even more stringent proposals by Respondent. DeCarli said that the Union had no alternative but to file an appropriate charge with the Board.

3. The Settlement Agreement and Efforts to Obtain Compliance Therewith

Subsequent to the filing of the charge on February 4, 1976, an informal all-party settlement agreement was approved by the Regional Director for Region 27 on April 27, 1976. The settlement agreement provides, in substance, that Respondent will not refuse to bargain collectively in good faith with the Union; will not insist that the Union post a security bond as a condition to entering into an agreement; will not insist to the point of impasse upon a proposed management

rights clause granting Respondent the unilateral right to determine hours of work, working conditions, merit increases, and other terms and conditions of employment; will not insist to the point of impasse on a contract clause which would nullify the entire contract in the event of a change in the Union's affiliation, constitution or by-laws; and that Respondent will meet and bargain with the Union in good faith concerning employees' rates of pay, wages, hours of employment, and other terms and conditions of employment.

In order to effectuate compliance, the Compliance Officer of the regional office sent the parties a letter, dated May 3, 1976, requesting on a regular continuing basis detailed information regarding the parties- ensuing bargaining negotiations. The Compliance Officer directed further letters to Respondent, stating, inter alia, that it appeared Respondent

was not bargaining in good faith but rather was obstructing the bargaining process, and was putting itself in the unfortunate position of causing the settlement agreement to be vacated and the complaint reinstated. In addition the Compliance Officer suggested that Respondent seek competent assistance, including the services of FMCS.

As mentioned previously, by order dated October 31, 1976, the Regional Director's approval of the settlement agreement was withdrawn and the original complaint and notice of hearing was reinstated.

4. The Continued Negotiations - May 25, 1976 Through November 3, 1976

Upon the filing of the charge negotiations were discontinued, and were not resumed until May 25, 1976, subsequent to the approval of the settlement agreement. Thereafter the parties, represented by the same individuals, met and bargained on the following dates: May 25, June 7 and 22, July 6, August 5 and 30,

October 12 and 19, and November 3, 1976.

At the outset of the May 25, 1976 meeting, DeCarli handed Thomas the Union's original proposal, consisting of the 1974-1977 Independent Machine and Manufacturing Agreement, stating the Union's position that as a result of the settlement agreement bargaining would begin anew, and that the Union desired to once again discuss each section of the proposed agreement. Thomas said that he had already seen the contract and that there was no need to meet if the Union had no other proposal. Despite Thomas' opposition, the parties apparently proceeded to discuss the contract. Thomas proposed an introductory paragraph acceptable to the Union, containing the parties respective names, and, at one point during the meeting Thomas was asked to initial or sign off that section. Thomas declined, stating that he might want to change the language as negotiations proceeded, that agreement on all items was tentative, and that

no portion of the contract would be finally agreed to until agreement was reached on an entire contract. Thomas rejected the proposed "Purpose of Agreement" section; proposed an "open shop" clause; rejected the Union's wage proposal and renewed the identical wage proposal advanced by Respondent during the pre-settlement bargaining; and rejected the Union's training proposal stating that he would never agree to a training program and that it was the Union's job to train employees. DeCarli requested Thomas to prepare and furnish at the next meeting counterproposals to each section of the Union's proposals. Thomas refused to do so.

The next meeting was held on June 7, 1976. DeCarli stated that he had received a copy of a particular letter from the Compliance Officer to Thomas, and asked Thomas whether as suggested by the Compliance Officer, he was going to request bargaining assistance from FMCS. Thomas said no. DeCarli reiterated that the

Union agreed to the introductory language proposed by Thomas at the previous meeting and requested Thomas to sign off that item. Thomas again said he would not sign anything off, and that all items would be subject to change until final agreement was reached. Thomas stated that he was continuing to negotiate because he had been threatened by the NLRB and that he was innocent of past bad faith bargaining. DeCarli again proposed the aforementioned "Purpose of Agreement" clause, and Thomas replied that such was unnecessary. However, Thomas suggested other language which was unacceptable to the Union. Thomas refused to agree to sign off the jurisdiction section of the contract even though the Union tentatively agreed to Respondent's jurisdictional proposal, Thomas again stating that he did not want to sign anything as he may want to change it later.

DeCarli stated that, pursuant to instructions from the Compliance Officer, Thomas

was required to submit written proposals. Thomas said that the NLRB didn't know what it was doing, that the law does not require written proposals and he wasn't about to submit any, and that the NLRB was union oriented and he had no chance of getting a fair shake. Further, Thomas made a profane utterance regarding the Compliance Officer and stated the only real authority the NLRB had over him was to take him to federal court.

At the next meeting, June 22, 1976, Thomas reiterated, in response to the Union's request for a seniority clause, that he would never agree to a seniority clause; that vacations would be included in Respondent's work rules and would therefore not be a part of the collective-bargaining agreement; that holidays would also be included in the work rules so that he could have the flexibility to unilaterally determine who would receive holiday pay; and that, in addition, leaves of absence would be treated under work rules. Thomas

further said he would not recognize shop stewards. DeCarli suggested that since Thomas continued to insist upon putting such important matters concerning wages, hours and working conditions outside the operative provisions of the contract, Respondent should make a definitive proposal in this regard, and requested that Thomas propose language establishing a committee of employees and representatives of the company to jointly determine the work rules. Thomas suggested that the Union prepare such language, and DeCarli agreed to do so. Thomas said his wage proposal remained the same as previously submitted, namely, that wages would be subject to a merit system under Thomas' unilateral control, and would also be governed by the supply of and demand for labor in the market place.

At the July 6, 1976 meeting, DeCarli proposed language establishing a work rules committee. The committee was to consist of two individuals selected by the employees and two

individuals selected by the Respondent, and would establish work rules applicable to all employees. Thomas said the proposal appeared satisfactory but that he contemplated some changes and would reply at the next meeting. Regarding the Union's proposal on shop stewards, Thomas felt his shop was not large enough to warrant the services of a shop steward. DeCarli assented to this, and agreed to withdraw the said proposal. Thomas refused to allow the Union bulletin board privileges, stating that the bulletin board was cluttered enough with state and federal regulations and that the Union could contact the employees by mail. Thomas objected to the Union's proposal on plant visitation, stating that it was improper to interrupt employees' work during working hours, but proposed language permitting contact with employees before or after working hours or during the employees' lunch break.

At the August 5, 1976 meeting, Thomas rejected the Union's work rules proposal,

stating that while employees could participate and suggest ideas on their own time, he wanted to reserve to himself the sole right to make the final decision regarding the work rules to be established. DeCarli stated that this was unacceptable, and that he had been led to believe by Thomas at the prior meetings that employees would have a substantial voice in the work rules to be established. Thomas stated that the 60-day notice posting period required by the settlement agreement had expired, and that he was therefore required to make no further reports to the Compliance Officer. He enumerated three methods of bringing an end to negotiations, namely, the Union sending a letter to Respondent disclaiming interest in representing Respondent's employees; the employees sending a letter to both Respondent and the Union stating that they no longer desired representation; and a decertification election. DeCarli stated that the expiration of the notice posting period

did not relieve Respondent of its bargaining obligation. Thomas replied that was a bunch of bull and he did not have to negotiate further.

Thomas again refused to negotiate contract language regarding vacations, stating that he would not agree to anything in the contract obligating him to pay specific amounts for vacation pay. Elaborating, Thomas said that if he felt he was not financially able to pay employees their vacation pay he wanted the unfettered right to refuse to do so, and that therefore, vacations would be covered by work rules, rather than under the contract. DeCarli asked Thomas what he thought negotiations were all about. Thomas replied that no matter what happens in negotiations he would not surrender any of the prerogatives of management that he had enjoyed prior to the Union, that negotiations would not result in any changes from those conditions existing previously, and that he was not going to place a financial burden on Res-

pondent by agreeing to monetary provisions on a long-term contract basis, but rather would include such matters in work rules thus avoiding any enforceable financial obligation.

At the August 30, 1976 negotiating session, in the presence of a federal mediator, DeCarli announced to Thomas that, in the interest of reaching a speedy resolution of the matter, the Union was withdrawing numerous items from its original proposal. Thereupon DeCarli handed Thomas a contract proposal from which had been deleted union proposals regarding area uniformity; training; shift premium; reporting, minimum and call back pay; shift transfers; travel time; leaves of absence; bulletin boards; ownership obligation; voluntary plant shutdown; jury duty; pension; and cost of living. There was considerable discussion of the Union's revised contract proposal, and apparently, some areas of general agreement. Thomas stated that he would not agree to the proposed arbitration clause because he did not

like arbitrators, and requested that under the proposed validity of agreement clause any reference to governmental agencies should be deleted because he disliked governmental agencies. No items were specifically agreed to at the meeting, and Thomas stated he would submit counter proposals at the next meeting.

The next meeting occurred on October 12, 1976. A federal mediator was again present. On September 21, 1976, Thomas had brought a contract proposal to DeCarli's office, and at the October 12, 1976 meeting DeCarli asked Thomas if the submitted proposal was a final proposal or whether Thomas would be willing to engage in further negotiations. Thomas stated that he was there to negotiate, and DeCarli replied that he was not interested in wasting any more time and wanted to quickly reach agreement. Thereupon, DeCarli agreed to approximately 24 items in Respondent's proposed contract, requested certain additional changes, and asked

that another meeting be scheduled as soon as possible to wrap up the agreement.

At the next meeting, on October 19, 1976, Thomas submitted a proposal incorporating some of the changes requested by the Union at the prior bargaining session. Provisions concerning holidays and vacations were included in the contract, Thomas having apparently abandoned his position that these items would be subject to the work rules section of the contract. There was discussion on the remaining open issues and both parties apparently stated that their final respective positions would be advanced at the next meeting.

The final meeting was held on November 3, 1976. At the outset of the meeting an employee handed DeCarli a petition signed by two employees stating that they no longer desired to be represented by the Union.[10/] DeCarli told

---

10/ Prior to this time there had apparently been a similar petition filed with the Board. The petition was apparently dismissed by the Regional Office and the appeal of the dismissal denied by theBoard.

Thomas that he had read Respondent's proposal in its entirety and could accept all of the section except for a portion of section 4, the entirety of section 15, 16, and 20, and portions of section 23.[11/] DeCarli presented the Union's position on each objectionable item, and stated that insistence on such items constituted bad faith bargaining. The federal mediator, in apparent agreement with the Union's announced position, stated that if Respondent would withdraw or sufficiently modify the five items objected to by the Union another negotiating meeting would be scheduled. If not, FMCS would withdraw its services and the matter would be litigated by the Board.[12/] Thomas then stated that he would only be willing to withdraw the objectionable portions of section 23.

11/ The text of the five items in dispute is set out in the "appendix" attached hereto.

12/ Theretofore the Regional Director had withdrawn approval of the settlement agreement and had reinstated the original complaint.

This meeting concluded, according to DeCarli's minutes of the meeting, "with everyone understanding that Mr. Thomas was to contact the FMCS for the next meeting provided those five items were removed from the table. Otherwise the next meeting between the parties would be in court. No such communication from Thomas evidencing an intent to withdraw or modify the provisions in question was forthcoming.[13/]

C. Analysis and Conclusions

The meaning of good-faith bargaining was defined by the Court in N.L.R.B. v. Reed & Prince Mfg. Co.,[14/] as follows:

> The respondent... was legally bound to confer and negotiate sincerely with the representatives of its employees. It was required to do so with an open mind and a sincere desire to reach agree-

13/ The foregoing discussion of the bargaining meetings and proposals presented is largely based upon the credited testimony of DeCarli, supplemented by DeCarli's detailed minutes of certain meetings. DeCarli favorably impressed me as a credible witness, and to the extent that the testimony of Thomas may differ with that of DeCarli in any material respect, I credit DeCarli.

14/ 118 F.2d 874 (C.A. 1, 1941).

> ment in a spirit of amity and cooperation. The cases setting forth this obligation are many, and it is well settled that a mere formal pretense at collective bargaining with a completely closed mind and without this spirit of cooperation and good faith is not a fulfillment of this duty.

Thus, "The Act not only requires that the parties go through the motions of negotiations, but it also demands that they negotiate in good faith,"[15/] and the right not to agree or concede, or to refuse a particular proposal or make a concession, may not be utilized as a cloak "to conceal a purposeful strategy to make bargaining futile or fail."[16/] Further, the mere fact that a party bargains on certain issues in an attempt to reach overall agreement, while at the same time frustrating agreement on one or more substantial issues, does not suffice to fulfill the requirements of good-faith bargaining.[17/]

15/ United Steelworkers of America, AFL-CIO (Roanoke Iron & Bridge Works, Inc.) v. N.L.R.B., 390 F.2d 846,852 (C.A.D.C., 1967)

16/ N.L.R.B. v. Herman Sausage Company, Inc. 275 F.2d 229,232 (C.A. 5, 1960).

17/ King Radio Corporation, Inc. 172 NLRB 1051, 1068, enfd. 416 F.2d 569 (C.A. 10, 1969), cert. denied 397 U.S. 1140.

At the initial bargaining session Thomas stated to DeCarli that the Union would never get him to sign a collective-bargaining agreement. Thereafter throughout the 22 bargaining sessions over a protracted period of time, Thomas overtly exhibited the utmost disregard for the collective-bargaining process, and engaged in conduct totally inconsistent with even a modicum of good-faith bargaining.

Thomas' intolerance of the aforementioned principles of collective bargaining is clearly reflected by his intransigence in including even so innocuous a clause in the contract as a statement to the effect that the purpose of the agreement is to promote continuity of friendly relations between the parties. Similarly, Respondent's refusal to allow the Union permission to use the bulletin board is indicative of such a noncooperative bent. Such attitude is further evidenced by language proposed in Respondent's last contract proposal dated October 19, 1976:

> The purpose of this contract is to put into writing the agreement by which the union and the employees secure specific and limited rights from management which at the beginning management had absolute perogative (sic).

Thomas admittedly entered negotiations with a fixed intent not to agree to a union-security clause or to contractual seniority provisions, both mandatory subjects of bargaining, expressing his views during the course of bargaining, and also at the hearing, that he inherently disapproved of such provisions. Thereafter, throughout the entire course of bargaining, the Union's continued attempts to negotiate a union-security clause and a seniority clause into the contract proved futile, Thomas maintaining his fixed resolve in this regard.

Likewise, commencing with the second bargaining session, and maintained throughout negotiations, Respondent insisted upon the unilateral right to place employees within various classifications and to determine the specific

rate of pay for each employee, within a broad wage range, based upon merit determinations to be made solely by Respondent. At a later session Respondent expanded this concept by insisting upon reserving to itself the unilateral right to raise or lower wages 10 percent due to business conditions or the competitiveness of the labor market.

At the fourth meeting Thomas proposed an all-inclusive management rights clause, operating as a complete retention of virtually all matters pertaining to mandatory subjects of collective bargaining. Despite belabored bargaining and vociferous objection by the Union regarding this proposal, Respondent not only refused to make deletions therefrom but rather bolstered the proposal with additional unilateral prerogatives of management, culminating in a final management rights proposal upon which, on and after November 3, 1976, Respondent continued to insist. ("Appendix A," Section 15: Management).

On two separate occasions, September 24, 1975, and October 6, 1975, Respondent imposed arbitrary deadlines, offering therefor no legitimate business justification and requiring by the announced deadline the acceptance by the Union of entire contract proposals on a take it or leave it basis. Respondent would permit no bargaining thereon, and later withdrew the said proposals as a result of the Union's refusal to accept them in their entirety by the proscribed dates. The aforementioned proposal of September 24, 1975, contained a clause providing that any change in the Union's constitution, by-laws or affiliation would invalidate the contract. As alleged in the complaint, such matters involving the Union's internal structure or rules constitute nonmandatory subjects of bargaining. Therefore, by insisting on such a provision dealing with relations between employees and their union, Respondent violated Section 8(a)(5) of the Act. See N.L.R.B. v. Borg-Warner Corp.,

356 U.S. 342. Likewise, under similar circumstances, Respondent's insistence upon the posting of a performance bond, also a nonmandatory subject of bargaining, constituted a per se violation of the Act, as alleged in the complaint. Scripto Manufacturing Company, 36 NLRB 411; Hall Tank Company, 214 NLRB 995.

Throughout bargaining, Respondent demanded that the Union agree to a no-strike clause while refusing to agree to a contract proposal providing for arbitration of grievances. Rather, Respondent maintained throughout bargaining that should a grievance remain unresolved for a period of 30 days, the aggrieved party "may petition a court of jurisdiction to hear the case and render a decision."

Respondent's insistence upon other items is likewise indicative of bad faith bargaining. Thus, Respondent maintained that the entire contract would or could be nullified as a result of certain contingencies, namely, by a

majority of employees stating in writing that they no longer desired union representation; or if, in the opinion of one of the parties, a court decision changed the meaning of the contract; or, in the event there was any change whatsoever in Respondent's ownership. Further, Respondent initially insisted that prior to negotiating a successor contract, the Union must again prove its majority status. Such a position was withdrawn at the last meeting only after protestations from the Union, confirmed by the representations of the federal mediator, that insistence upon such a clause was contrary to law.

An examination of Respondent's contract proposals makes it abundantly clear that Respondent, from the outset, took and maintained a firm and unalterable stand on all major contract issues and even on most minor matters. Respondent exhibited by its intractable attitude and patently unacceptable contract proposals, underscored by statements during the

course of bargaining to the effect that no collective-bargaining agreement would be entered into and that employees would not benefit from the advent of the Union, an intent to subvert the collective-bargaining process. Respondent's failure to make, for the most part, even arguably acceptable contract proposals cannot be attributed to lack of flexibility in the Union's position, as Respondent maintains. Rather, the record evidence clearly shows that from the outset of negotiations the Union remained eager to discuss its proposals and frequently invited counterproposals from Respondent. Indeed, at the last few negotiating sessions the Union exhibited the utmost willingness to bring negotiations to fruition by agreeing that the contract would contain no form of union security, no seniority provision, no arbitration clause, and no increase in the wages paid and benefits afforded the employees. Yet, despite the Union's relinquishment of such contract

provisions, generally considered to constitute the very nucleus of a viable collective-bargaining agreement, Respondent continued to insist upon patently unacceptable provisions, including a management rights clause, a work rules clause, and an ownership clause which, under the circumstances, the Union could not, in good conscience, be expected to accept.[18/]

The Board's language contained in Tomco Communications, Inc.[19/] has particular application to the facts of the instant case:

> In our opinion, Respondent's "last, best and final offer" was nothing more than a demand on the part of Respondent that the Union abdicate virtually every right it would normally possess to represent effectively the employees involved during the contract, particularly when not only its representation rights are decimated, but the overall improvement

---

18/ The fact that the Union, in order to bring an end to the protracted and unproductive bargaining marathon, did reluctantly accept certain contract provisions, does not alter the fact that such provisions, even though accepted by the Union, are indicative of bad faith bargaining. See San Isabel Electric Services, Inc., 225 NLRB No. 151.

19/ 220 NLRB 636, 637-638.

> in the employees' benefits are minimal if not nonexistent; nor can we accept the contention that Respondent...in good faith believed that such a proposal would ever be accepted by the Union. In these circumstances, we find and conclude that the Respondent has failed to engage in good-faith bargaining as envisioned by the Act and that it thereby violated Section 8(a)(5) and (1) of the Act.

On the basis of the foregoing, I find that Respondent entered into negotiations with an intent to subvert the bargaining process, announced to the Union that such was Respondent's intention, and, by its protracted bad faith bargaining, insured the intended result.[20/] It is therefore crystal clear, and I so find, that Respondent has failed and refused to bargain in good faith during the entire course of bargaining in violation of Section 8(a)(5) and (1) of the Act. N.L.R.B. v. Montgomery Ward & Co., 133 F. 2d 676 (C.A. 9, (1943);

20/ The continuing refusal to bargain subsequent to the settlement agreement, found herein, is sufficient ground to set aside the settlement agreement. San Isabel Electric Services, Inc., supra.

Tomco Communications, Inc. supra; Reed & Prince Mfg. Co., 96 NLRB 850, enfd 205 F.2d 131 (C.A. 1, 1953); San Isabel Electric Services, Inc., supra; "M" System, Inc., Mobile Home Division Mid-State Corporation, 129 NLRB 527; King Radio Corporation, Inc., supra.

Conclusions of Law

1. Betra Manufacturing Company is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent at its San Jose, California facility, excluding professional employees, salesmen guards, office clerical employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargain-

ing within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union was and now is the majority representative of the employees in the aforesaid bargaining unit within the meaning of Section 9(a) of the Act.

5. By insisting during the course of bargaining that the Union agree that any change in its constitution, by-laws, or affiliation would invalidate the contract, by insisting that the Union agree to post a performance bond, by insisting upon a management rights clause or other clauses which would confer upon Respondent the unilateral right to determine virtually all terms and conditions of employment, by insisting upon a work rules clause which would confer upon Respondent the right to unilaterally change work rules affecting employees' conditions of employment, and by otherwise failing and refusing to bargain in good faith, Respondent has engaged in

unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The Remedy

Counsel for the General Counsel, in his very comprehensive and helpful brief, makes a persuasive argument for the imposition of an extraordinary remedy herein, given the egregious nature of Respondent's unlawful conduct. Requesting, inter alia, that Respondent be ordered to reimburse the Union for its expenses incurred in negotiations and that Respondent be ordered to reimburse both the Union and the Board for their expenses incurred in the investigation, preparation, presentation and conduct of the instant case, the General Counsel relies upon Tiidee Products, Inc.[21/] While it appears obvious, as argued by General Counsel, that the Respondent's flagrant unfair labor practices would not be adequately remedied by the customary imposition of a bargaining order and the posting of a notice, and

21/ 194 NLRD 1234.

while I would otherwise recommend the extraordinary remedies requested herein by the General Counsel, it appears that the Tiidee case is factually distinguishable and that no other precedent is supportive of such a remedy. Consequently, I shall deny the General Counsel's request.

Having found that Respondent has engaged in flagrant and pervasive unfair labor practices, both prior to and after entering into a settlement agreement providing for the posting and adherence to the provisions of a customary Notice to Employees, I shall recommend that it cease and desist from engaging in such or similar unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to, upon request, bargain collectively with the Union in good faith and, if an agreement is reached, embody such understanding in a signed agreement, and post at its San Jose, California

facility copies of the attached notice marked "Appendix B."

Upon the foregoing findings of fact, and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 22/

ORDER

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from in any manner engaging in surface bargaining or other collective bargaining not in good faith, without real intention of reaching a meaningful collective-bargaining agreement with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504, as duly designated exclusive

22/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

bargaining representative of its employees in the agreed upon appropriate unit.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the appropriate unit and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at its San Jose, California facility copies of the attached notice marked "Appendix B."[23/] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be

23/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the data of this Order what steps Respondent has taken to comply herewith.

Dated: Jul 28 1977

/signed
Gerald A. Wacknov
Administrative Law Judge

APPENDIX A

SECTION 4: WAGES

* * *

All rates in these classifications may be raised or lowered by management 10% due to business conditions or competitiveness of the labor market by giving the Union and employees a ten day notice.

* * *

SECTION 15: MANAGEMENT

The Union recognizes those rights and responsibilities which belong solely to the company as unilateral rights, including, without limitation on the generality of the foregoing, the right to manage the company's business and to direct the working force, the right to hire employees, the right to classify employees, the right to require physical examination, the right to maintain order and efficiency, the right to extend, curtail, or terminate operations of the company, to determine the size

and location of the company's plant or operations, and to determine the type and amount of equipment to be used, and the assignment of the work, the rights of owners, stockholder, supervisory, professional, technical and other employees to perform any work. The right to determine production schedules, methods, standard processes, means of manufacture and material to be used, the right to subcontract any work within or outside the plant, the right to introduce new and improved methods or facilities and to change existing methods or facilities, the right to promote or demote employees, the right to transfer employees, the right to discipline, suspend and discharge employees, layoff for lack of work, the right to determine the number of employees, the right to pay or not to pay for services not performed, the right to determine the number of shifts, the number of hours and days in the work week, hours of work, the right of scheduling work, the right to make

work assignments, the right to assign overtime, the right to require employees to observe rules and regulations issued by the company, the right to demand compliance in matters of safety and discipline for non-compliance, the right to determine the products to be manufactured and set work standards, do time studies, and to maintain performance records for all jobs, the right to set incentives as long as former base hourly earnings are not reduced, the right to set quality standards and discipline or discharge for poor or sub quality. All rights, powers or authorities the company had prior to signing a union agreement are retained by the company, except those specifically modified by this agreement.

SECTION 16: COMMITTEE ON COMPANY WORK RULES

Employees may participate in helping to establish written work rules if they wish to do so. This will be on their own time after working hours.

SECTION 16: COMMITTEE ON COMPANY WORK RULES (continued)

The employer will set up a committee to help establish formalized work rules. Service on the committee by employees will be voluntary. The committee will consist of three persons selected by the shop employees and three persons selected by management and a representative of the union. The committee will meet monthly and all rules will be put in booklet form and distributed to the employees. Each employee will sign a sign-off page in two places - one part for him and one part for the employer, as a record he received them.

Any rules proposed by the company and not accepted by a majority of the committee will still be company rules but will be noted by an asterisk in the booklet with a note stating that the committee did not agree with this rule but that management felt it was necessary and thus is part of work rules under management's perogative. The committee may discuss

other items concerning the works operation or the employees' welfare.

SECTION 20: COMPANY'S OWNERSHIP

In order to assure the company complete freedom in the market place the Union and employees agree that in the event of a change in composition of the business ownership the contractual relationship will cease.

The new ownership will then be subject to only the rights of the employees as they may be exercised under Section 7 of the N.L.R. (sic)

> "Section 7. Rights of employees. Employees shall have the right to self-organization, to form, join, or assist labor organizations. To bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

It is further agreed that the employer will not be required to bargain about any changes or affects of changes to the employees or others because of his decision to make a change in the ownership or sale of the business.

SECTION 23: TERM OF THE AGREEMENT

* * * *

If a majority of employees no longer wish to be represented by the signing union, they may, by indicating so in writing. After the Union and employer have been notified by registered mail of this decision, the contract will become null and void and the Union will no longer be the representative for the purpose of collective bargaining. They will represent them-

selves or be able to exercise their rights in another direction under Sec. 7 of the N.L.R. Act. (sic)

Also the Union agrees to prove it still represents a majority of present employees before entering into negotiation on another contract or extension of this contract.

The majority shall be proved by an election by secret ballot held at the company place of business. The Union will be given a chance to talk to the employees for 10 minutes before the election. Management will also be given 10 minutes to speak and the union then given 5 minutes for rebuttal. Then all employees will mark ballots in privacy and deposit in sealed box. The ballots shall be counted as soon as voting is over and if a majority vote for the Union, it will continue as the employees' representative for the purpose of collective bargaining.

The election shall be held on Wed., three weeks before the expiration of the contract.

For this contract the election day will be Wednesday_____ 10 a.m.

* * * *

FORM NLRB-4727 APPENDIX B JD-(SF)-153-77

NOTICE TO

EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES

GOVERNMENT

YOU WILL RECALL THAT WE HAVE PREVIOUSLY POSTED A NOTICE SIMILAR TO THIS ONE WHEREIN WE MADE A COMMITMENT TO YOU TO OBEY THE LAW. AFTER A FORMAL HEARING AT WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, IT HAS BEEN DECIDED BY THE NATIONAL LABOR RELATIONS BOARD THAT WE DID NOT LIVE UP TO OUR PROMISES CONTAINED IN THE FIRST NOTICE, AND THAT WE HAVE CONTINUED TO VIOLATE THE NATIONAL LABOR RELATIONS ACT. THEREFORE WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE ARE HEREBY ORDERED TO ADVISE YOU THAT WE INTEND TO HONOR THE COMMITMENTS MADE TO YOU IN THIS NOTICE. IN THE EVENT THAT WE DO NOT, WE

MAY THEREBY BECOME SUBJECT TO SUBSTANTIAL MONETARY FINES AND OTHER SANCTIONS IMPOSED BY A UNITED STATES COURT OF APPEALS UNTIL OUR OBLIGATION TO YOU UNDER THE LAW IS SATISFIED.

The Act gives employees the following rights:

To engage in self-organization;

To form, join or assist unions;

To bargain collectively through representatives of their own choosing;

To engage in activities together for purposes of collective bargaining or other mutual aid or protection;

To refrain from any or all such activities, except to the extent that the employees' bargaining representative and an employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT do anything that interferes with

these rights. More specifically:

WE WILL NOT refuse to bargain collectively in good faith with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. 93, LOCAL LODGE NO. 504, as the exclusive representative of our employees in the appropriate unit described below concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT insist that the Union post a security bond as a condition to our entering into a collective-bargaining agreement with the Union.

WE WILL NOT insist to the point of impasse on a proposed Management Rights Clause or other clauses granting us the unilateral right to determine hours of work, working conditions, merit increases, and other terms and conditions of employement in the unit described below.

WE WILL NOT insist to the point of impasse on a collective-bargaining contract clause which would nullify the entire collective-bargaining agreement in the event of a change in the Union's affiliation, constitution or by-laws.

WE WILL NOT insist to the point of impasse on a contract clause granting us the unilateral right to make and change work rules affecting employees' condition of employment.

WE WILL NOT otherwise engage in surface bargaining or other collective bargaining not in good faith, without real intention to reach a meaningful collective-bargaining agreement with the Union.

WE WILL, upon request, meet and bargain collectively in good faith with a duly authorized representative of the Union concerning our employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a

signed agreement. The unit is:

All employees employed by the Employer at its San Jose, California facility; excluding professional employees, salesmen, guards, office clerical employees, and supervisors as defined in the Act.

BETRA MANUFACTURING COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

I certify that the foregoing matter is a true typed copy of the original documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 1980 at San Jose, California.

Mark J. Thomas, Petitioner

DENIAL OF PETITION FOR REHEARING
AND SUGGESTION FOR A REHEARING
EN BANC

(Stamped)
Richard H. Deane
Clerk

FILED SEPTEMBER 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7210

NATIONAL LABOR RELATIONS BOARD
Petitioner,
vs.
BETRA MANUFACTURING COMPANY,
Respondent.

No. 79-7210

O R D E R

Before: ANDERSON and FLETCHER, Circuit Judges, and ZIRPOLI*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

*The Honorable Alfonso J. Zirpoli, Senior United States District Judge, District of Northern California sitting by designation.

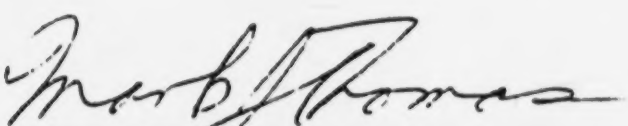
The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

I certify that the foregoing matter is a true typed copy of the original documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 1980 at San Jose, California



Mark J. Thomas, Petitioner

No. 80-1140

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARK J. THOMAS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1140

MARK J. THOMAS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner's company violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain in good faith with the Union.

2. Whether petitioner's company was denied procedural due process.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 6

Conclusion 8

TABLE OF AUTHORITIES

Cases:

NLRB v. *American National Insurance Co.*, 343 U.S. 395 7

NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 6-7

NLRB v. *Truitt Manufacturing Co.*, 351 U.S. 149 7

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 7, 29 U.S.C. 157 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 1, 5

Section 8(a)(5), 29 U.S.C. 158(a)(5) 1, 5, 6

Section 8(d), 29 U.S.C. 158(d) 1, 6

PREVIOUS PAGE WAS BLANK

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 624 F. 2d 192 (table). The decision and order of the Board (Pet. App. 5-93) are reported at 233 N.L.R.B. 1126.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1980, and a petition for rehearing was denied on September 15, 1980 (Pet. App. 94-95). The petition for a writ of certiorari was filed on December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 7, 8(a)(1), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 157, 158(a)(1) and 158(a)(5), are set forth in the petition (Pet. 3-4). Another relevant provision of the Act, Section 8(d), 29 U.S.C. 158(d), provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. In May 1975, after winning a representation election, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504 ("the Union") was certified as the bargaining representative of the Betra Manufacturing Company's employees

(Pet. App. 32). Negotiations for a collective bargaining agreement began on June 9, 1975. From that date until January 19, 1976, the parties engaged in 13 negotiating sessions. Throughout the negotiations, petitioner Mark Thomas, the Company's owner, served as its principal spokesman, and Union Business Representative John DeCarli acted as the Union's chief negotiator (Pet. App. 33-34).

At the initial June 9 negotiating session Thomas told Union negotiator DeCarli that the Union would never get him to sign a collective bargaining agreement (Pet. App. 34). Thereafter, during the course of the 13 negotiating sessions, the Company and the Union made very limited progress toward reaching an agreement. Thomas refused to consider Union proposals on matters such as seniority and union security, and objected to such proposals as a "purpose of agreement" section and a provision allowing the Union use of the Company's bulletin boards. At the same time, Thomas insisted on the inclusion of broad "management rights" and "work rules" provisions—which would have given the Company unilateral control over matters affecting employees' terms and conditions of employment—as well as provisions that would have allowed the Company to determine the wages of employees within a broad range or lower all wages by 10% on the basis of business conditions or the competitiveness of the labor market. Thomas also pressed for acceptance of contract provisions requiring the posting of a $10,000 performance bond by the Union, and invalidating the contract in the event of any change in the Union's constitution, by-laws, or affiliation (Pet. App. 34-46).

At two negotiating sessions, Thomas presented Union negotiator DeCarli with a proposal for a complete contract, stating that the proposal had to be accepted in its entirety by a date certain, without any changes or discussion (Pet. App. 42-44). At the twelfth bargaining session, held on January 5, 1976, Thomas stated that he had told his employees that,

although they had voted the Union in, there would be no changes in employees' working conditions as a result of bargaining with the Union (Pet. App. 47). On January 19, 1976, when the next negotiating session was held, Thomas stated that he had no proposals to make, that he would never accept any Union proposals, and that future meetings would not be more productive and would only result in more stringent Company proposals (Pet. App. 47-48).

On February 4, 1976, the Union filed an unfair labor practice charge alleging that the Company had refused to bargain in good faith. A Board complaint based on the Union's charge was issued on March 31, 1976. Thereafter the Company and the Union entered into an informal settlement agreement, which was approved by the Board's Regional Director on April 27, 1976 (Pet. App. 48-49).[1] In order to effectuate compliance with the terms of the settlement agreement, the Board's Compliance Officer, by letter dated May 3, 1976, requested the parties to submit information on a regular basis concerning their continued negotiations. The Compliance Officer subsequently sent several additional letters to the Company, stating, *inter alia*, that the Company was required to submit written contract proposals, that it appeared that the Company was not bargaining in good faith but rather was obstructing the bargaining process, and that the settlement agreement would be withdrawn if the Company continued to engage in such conduct (Pet. App. 49-50).

Following the settlement agreement, negotiations resumed on May 25, 1976, and continued through the course

---

[1]The settlement agreement provided, *inter alia*, that the Company would not refuse to bargain in good faith with the Union and insist on contract provisions involving nonmandatory bargaining subjects to the point of impasse, and that the Company would meet and bargain collectively in good faith with the Union concerning employees' terms and conditions of employment (Pet. App. 48-49).

of nine bargaining sessions—the final session being held on November 3, 1976. During these nine sessions substantial progress was made on reaching an agreement, even though Thomas displayed a reluctance to submit written contract proposals or to initial agreed-upon proposals during the first few post-settlement meetings (Pet. App. 50-63). At a bargaining session held on August 30, 1976, with a federal mediator present, Union negotiator DeCarli presented a contract proposal from which he had deleted sections on a wide range of topics, *e.g.*, area uniformity, training and shift premium; and general agreement was reached in some areas (Pet. App. 59). On October 12, 1976, at the next bargaining session, DeCarli agreed to approximately 24 items in the Company's most recent contract proposal and requested modifications in other sections of the Company's proposal (Pet. App. 60-61). The Company continued, however, to insist on contract provisions under which it retained broad discretion with respect to wages and the promulgation of work rules, as well as an extremely broad management rights clause and a section which required the Union to prove its continued majority status prior to negotiations for a new contract. In addition, Thomas continued to insist on contract language providing that the contract would be nullified if there were any change in the Company's ownership, or if a majority of employees stated in writing that they no longer desired to be represented by the Union. At the final negotiating session, held on November 3, 1976, DeCarli told Thomas that he was in general agreement with the Company's latest contract proposal except for these five provisions; Thomas indicated willingness to modify only one of them. A federal mediator present at the meeting told Thomas that another meeting would be scheduled if the Company would withdraw or sufficiently modify its position on these subjects; otherwise, the Federal Mediation and Conciliation Service (the "FMCS") would withdraw its services and the matter would be litigated before the Board.

The meeting concluded with the understanding that Thomas would contact the FMCS if he agreed to alter the Company's position concerning the matters remaining in dispute. Thomas never communicated any intent to withdraw or to modify the disputed provisions (Pet. App. 61-63, 81-88).

2. The Board, adopting the findings and conclusions of the Administrative Law Judge, found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union (Pet. App. 6, 63-67).[2] As the administrative law judge explained (Pet. App. 70-71):

> An examination of Respondent's contract proposals makes it abundantly clear that Respondent, from the outset, took and maintained a firm and unalterable stand on all major contract issues and even on most minor matters. Respondent exhibited by its intractable attitude and patently unacceptable contract proposals, underscored by statements during the course of bargaining to the effect that no collective-bargaining agreement would be entered into and that employees would not benefit from the advent of the Union, an intent to subvert the collective-bargaining process. Respondent's failure to make, for the most part, even arguably acceptable contract proposals cannot be attributed to lack of flexibility in the Union's position,

---

[2]The Board upheld (Pet. App. 7 n.2) the Administrative Law Judge's denial of motions made by the Company for dismissal of the complaint on various constitutional grounds, concluding that they were "lacking in merit." The Company had moved for dismissal because, *inter alia*, the Board failed to grant the Company's request for appointed counsel, improperly denied its request for a trial by jury in federal court, deprived the Company of its right to a speedy trial, and exhibited administrative bias against the Company (Pet. App. 7 n.2, 29 n.1).

as Respondent maintains. Rather, the record evidence clearly shows that from the outset of negotiations the Union remained eager to discuss its proposals and frequently invited counterproposals from Respondent.

The Board ordered the Company to bargain in good faith with the Union upon its request. In addition, on the basis of its conclusion that the Company "displayed a total disregard for the rights of its employees to enjoy the fruits of their representation by good-faith negotiation of a contract," the Board also ordered the Company to grant the Union reasonable access to its bulletin boards; to make available to the Union a list of the names and addresses of all unit employees, to be kept current for a period of one year; and to post appropriate notices and mail copies to each of its employees (Pet. App. 10-14, 21a-26, 78-80).

3. The court of appeals upheld the Board's decision and enforced its order, concluding that substantial evidence supported the Board's finding that the Company refused to bargain in good faith with the Union (Pet. App. 1-4). The court also rejected the Company's contentions that enforcement of the Board's order should be denied because of the alleged bias of Board officials, procedural irregularities during the hearing before the Administrative Law Judge, and the desire of the Company's employees for a decertification election (Pet. App. 2-4).

ARGUMENT

1. Petitioner contends (Pet. 6, 17-18) that the Company bargained in good faith and that its defense to the unfair labor practice charges was erroneously rejected by the court of appeals. This contention is without merit. Sections 8(a)(5) and 8(d) of the National Labor Relations Act require an employer to bargain in "good faith." The question whether an employer has satisfied this obligation involves largely a factual determination based on an appraisal of the total conduct of the parties. See, *e.g.*, *NLRB* v.

Insurance Agents' Int'l Union, 361 U.S. 477, 498-499 (1960); NLRB v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting). Here the court of appeals affirmed the Board's finding that the Company's overall conduct during the course of protracted contract negotiations amounted to a failure to bargain in good faith with the Union. Further review of this essentially factual question is not warranted. *NLRB* v. *American National Insurance Co., supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner makes various conclusory allegations (Pet. 1-17, 22-24) with respect to alleged instances of deceit, bias, and procedural irregularities in the processing of charges filed against the Company, the monitoring of the settlement agreement, and the subsequent adjudication of the case before the Administrative Law Judge and the Board after the Company breached the agreement. As petitioner concedes (Pet. 16), however, he "pointed out" in his brief in the court of appeals all of the alleged "inequities and harrassments [*sic*]." The court of appeals permitted petitioner to supplement the record with documents that he contended supported his allegations (Pet. 16), "carefully examined" petitioner's contentions, and found them to be "without merit" (Pet. App. 4). That determination is correct, but in any event these fact-bound issues do not warrant further review by this Court. Petitioner's contentions respecting the litigation of the Board's enforcement petition in the court of appeals—*e.g.*, his assertions that the Board's brief construed cited cases in the light most favorable to its positions (Pet. 15, 17-18) and that the brief described petitioner as "disingenuous" even though the Board's attorney had not met him (Pet. 18)—similarly present no question appropriate for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board

MARCH 1981

DOJ-1981-03

No. 80-1140

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARK J. THOMAS

BETRA MANUFACTURING COMPANY
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

MARK J. THOMAS
REPRESENTING SELF,
OWNER

BETRA MFG. CO.
50 BELLEVUE AVENUE
SAN JOSE, CALIFORNIA
95110

(408)-292-9312

QUESTIONS PRESENTED

What is the value of the due process clause of the United States Constitution, Fifth Amendment guaranteeing a fair trial? Is due process denied if the judges of a Federal Appellate Court disregard the ethical principles behind the American Bar Association Canons of Judicial Conduct for Federal Judges by not taking appropriate action against a federal agency admitting in oral hearing before the Appeals Court their prosecution of the respondent was based on a fraudulent document submitted by the charging party?

Is a fair trial not further denied if the Administrative Law Judge made pretrial ex parte communication with the agency, denied my witnesses, and acted as an advocate of the agency during the trial; the N.L.R.B. Board condoning this action by stating no injustice was done?

TABLE OF CONTENTS

	Page
Judgments Below.	1
Jurisdictional Statement	2
Provisions of Law Involved in the Case.	3&4
Statement and Argument	5
Conclusion	14

AUTHORITIES

Cases:

Inland Steel Co. v. NLRB 109 F2d 9, 20-21 (7th cir. 1940). 10

NLRB v. Indiana Michigan Electric, 318 U.S. 405, 1943. . . 11

NLRB v. Koppel Co. 412 F2d, 681 (3rd cir. 1969) 11

NLRB v. Phelps et al, 136 F2d, 562, 563, (5th cir. 1943) . . 9, 10 12

NLRB v. Process & Pollution Control Co. 588 F2d, 786, 789 (10th cir. 1978). 11

NLRB v. Tamper Inc., 522 F2d, 781-790 (1975). 11

Tele-Trip Co. v. NLRB 340 F2d 575, 581 (4th cir. 1965). 11

CONSTITUTION

U. S. Constitution, 5th Amendment. 5, 8, 9 16

STATUTE

National Labor Relations Act, 29 U.S.C. 151 et seq.:. 6

MISCELLANEOUS

The Federalist, No. 83, Hamilton . . . 8

(Continued)

What is the value of a Constitutional clause that dictates fairness in a court of law if not one of the twenty-plus judges of the Ninth Circuit Court of Appeal when presented with our Petition for Rehearing outlining gross improprieties does not feel the ethics of his profession strongly enough to request a vote on the suggestion for a rehearing en banc?

FROM THE RECORD OF THE CASE

	Page
Petition for Rehearing Before the Appellate Court.	12
Transcript 208-213	12
Respondent's Appendix to Record, Volume R1b, p. 1-5.	12
Respondent's Brief to the Ninth Circuit, p.9.	10

JUDGMENTS BELOW

ORDER Filed September 15, 1980, U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion that Hearing be en Banc. Not reported

MEMORANDUM Filed July 21, 1980 U.S. Court of Appeals for the Ninth Circuit On Application for Enforcement of an Order of the N.L.R.B., "Enforcement of the Board's order is GRANTED," at 624 F2d 192 (Table).

DECISION of the N.L.R.B. Dated December 13, 1977. Cited: Betra Mfg. Co. and International Association of Machinists and Aerospace Workers, AFL - CIO, District Lodge 93, Local Lodge 504 1978 NLRB, 18, 828, 233 NLRB No. 156 Case # 32-CA-64, December 13, 1977

JURISDICTIONAL STATEMENT

Jurisdiction of this court is conferred by U.S.C. 28-1254 "Cases in the Court of Appeals may be received by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment.
2. The date of filing of the order to be reviewed is September 15, 1980. This is the order denying Petition for Rehearing and Suggestion that Rehearing be en Banc, U.S. Court of Appeals for the Ninth Circuit.

PROVISIONS OF LAWS INVOLVED IN THE CASE

U.S. Constitution, Fifth Amendment:

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.)

(Section 7). Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT AND ARGUMENT

In reply to the Brief for the N.L.R.B. in Opposition, we point out to this Court the glaring omission in their brief. THERE IS NO REPLY TO THE FIRST QUESTION CONCERNING THE DENIAL OF DUE PROCESS caused by the Board's prosecution of the petition which was instigated from a document which the Board and the General Counsel knew to be false. We can understand the N.L.R.B. side-stepping the issue. They have done this regarding all other contentions of irregularities. They never answer the charges specifically by a detailed or simple explanation. They have always used the "sweep it under the carpet" method by saying in effect we think your fears of injustice are an illusion; none of this has happened.

The one thing anyone in this country expects as a minimum of his Government is a reasonable explanation of the matter. In this case none has ever been offered - not even in the Board's and Solicitor General's Brief in Opposition to Certiorari was there any denial of the charges made by the petitioner or that he had exaggerated instances out of proportion to the actual basis. The tactic is used of simply referring to prior decisions where the N.L.R.B. prevailed. Even in those cases the reasoning involved is not divulged.

Let us consider our charge that the Board's action was taken against us with full knowledge that the Union's charging document was false - a primary accusation of ours which they have always ignored (R1b, 2) and still ignore - even before this Court. I am obliged to assume this omission is because the Board and its General Counsel are accessories after the fact. The N.L.R.B. Regional Office, the General Counsel and his lawyers, the hand-picked A.L.J.s and the adjudicating Board have used all their great powers in combination and probably collusion. (By law they are shielded by a thin screen between them which is often pierced. Congress made this scanty separation to dispel the public's fears that this combined group established under the Act might run afoul of the Constitutional concept of the separation of powers. In this Act, Congress also provided a sham enforcement process which does not allow a full trial by the Judicial Branch.)

It seems the only one connected in opposition to us in this case who has ever proved himself not an accessory was Mr. Lawrence Blatnick - the N.L.R.B. attorney. He exposed the sham at the Appeals Hearing. However, from the Memorandum Decision of the Ninth Circuit, it is obvious that the Panel overlooked this revelation with its obvious implication of criminal activity. He now avoids the issue

again in the Reply Brief; once more becoming an accessory by failing to reveal the truth. Considering his position as an officer of the Court in signing the Reply Brief (as a Government lawyer and employee paid by the public purse) should he uphold his agency in an action he has admitted to be illegal? Or does he not have an obligation to the citizenry to expose an illegal use of power? But I would be willing to forgive him this error because I believe his candor in the Appeals Hearing demonstrated his basic honesty. He spoke out against his powerful employers and by doing so the doors of a regulatory agency's biases and tyrannies are set ajar for greater inquiry within.

It surprises me that the Solicitor General - a scholar in jurisprudence - and by his position the most prestigious lawyer in the land, makes no comment as to my concern for justice at the hands of the Government. The Solicitor General does not even say that he has carefully examined the basis for Mr. Blatnick's revelation and has found it without merit, as the Appeals Court did. I could expect either the "sweep it under the rug treatment" or a careful investigation of the N.L.R.B. Counsel, Mr. Blatnick's declaration. If an investigation was really made, the Justice Department, in protecting the public against deceit in government would then enter a confession of

error (of the N.L.R.B.) and request Certiorari be granted and these abuses be condemned by the Court or explain the reason for Mr. Blatnick's revelation. But no mention of the matter tells me - a layman - that it is possible that by the next Centennial of the U.S. Constitution that we will have reverted to a situation that existed under the British Crown. The citizenry will be once more oppressed by the Government.

The basic idea of the Constitution was to protect the people against the government. One of its monumental concepts was the division of the Federal Government into three separate and distinct branches. There was further protection of the people against the government by granting them the right to a trial by jury when confronted by the government as explained by Hamilton in The Federalist, No. 83. In the light of the constant deterioration of these principles by administrative legal procedures, it seems reasonable to expect that the fledgling Constitution of 1787 will have become a two-hundred year old derelict. For administrative bodies now make regulations with the force of law.

I observe that the young Soviet Constitution and its Bill of Rights molded after ours grants far more rights than our own. From the outside we can see the U.S.S.R's

disingenuousness. In this case can we not see some of our own increasingly pervasive faults from within? The self-willed blindness of mutually supportive elements in the governmental processes leads to an accumulation of tyranny. It is a blindness of mind that in a bureaucracy becomes habit. It is in fact based on a fear of revelation of incompetence. For the ordinary subject of these abuses it is a form of warfare against him and the Constitution. A citizen of this country generally believes in the equation honest courts equal justice. In order for there to be reform it will be necessary for the Supreme Court to face the reality of these abuses in totality.

Having discussed the capriciousness of the N.L.R.B. and the General Counsel, we come to the bias of the A.L.J. not mentioned in the Solicitor General's brief. The ex parte communication of the A.L.J., his denial of witnesses, and advocacy of the N.L.R.B. are inexcusable biases. For an excellent discussion of bias we refer to N.L.R.B. v. Phelps, et al, 136 F2d, 562, 563 (5th cir. 1943). "* * * A fair trial by an unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done by a judge. Indeed

if there is any difference the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." See also Inland Steel Co. v. NLRB, 109 F2d 9, 20-21 (7th Cir. 1940).

The respondent should expect the Board to act as a check on the possibility of a biased or capricious A.L.J. and examine any accusations to that effect with much attentiveness. But * * * "The Board brushed aside with the bare statement that it had reached the conclusion that there was neither bias or prejudice on the part of the examiner which affected the fairness of the hearing to the respondents." (supra, NLRB v. Phelps p. 567).

To quote from our Respondent's Brief to the Ninth Circuit Court, p. 9, "It is a fact of common experience that evidence from testimony establishes credibility primarily, as demeanor judgments in themselves are likely to be inaccurate, and indeed simply prejudiced. 'Findings cannot be said to have been fairly reached unless material evidence

which might impeach, as well as that which will support its findings is heard and weighed.' NLRB v. Indiana Michigan Electric Co., 318 U.S. 405, 1943 405. In this case the error of the A.L.J. in prohibiting the crucial testimony of witnesses led him to improperly discredit my testimony. 'However our respect is not justified where, as here, the examiner has contributed to a witness' lack of credibility by improperly restricting his testimony.' NLRB v. Koppel Co. 412 F2d, 681 (3rd Cir. 1969). Similarly, see also NLRB v. Process and Pollution Control Co. 588 F2d, 786, 789 (10th Cir. 1978).

As the A.L.J. erred in this case on the negative side in restricting testimony he erred on the aggressive side in assuming a prosecutorial role. 'Once the A.L.J. undertook the General Counsel's prosecutorial function by ferreting out evidence of uncharged violations and building a case against the defendant-employer, he overstepped the permissible scope of his duties,' NLRB v. Tamper, Inc., 522, F2d, 781 790 (1975). See also Tele-Trip Co. v. NLRB, 340 F2d, 575, 581 (4th Cir. 1965)

Bias is fundamental, not secondary to perverting all findings of any judge. Here we have recourse again to the eloquence of Judge Hutcheson on the Fifth Circuit in

NLRB v. Phelps, * * * ' for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.' (supra NLRB v. Phelps, 564.)."

In view of the revelation of the N.L.R.B. attorney of a fraudulent charge, is it not true that bias charges apply to all the other Government participants in this case?

This case was decided on the credibility given the one Government witness by the A.L.J. This witness was the one who refused to bargain at the Jan. 19 meeting. In our cross-examination pressing this matter, he would not declare that this was the case. (TR.208-213.) Then in the Appeals Court the N.L.R.B. reveals that my contention brought forth in our declaration made to the field examiner was true and the union refused to bargain at the Jan. 19 meeting. (R1b, p. 1-5).

How can any conviction stand when the prosecuting party (the N.L.R.B.) admits their witnesses had made false declarations at the trial? (Petition for Rehearing before Appellate Court, page 2)

In their brief in opposition , the Solicitor General inaccurately described the Union charge (page 3). They say that the Union charge alleges the Company had refused to bargain in good faith. THIS IS NOT TRUE. As far as the unfair bargaining charge goes, the Union's charge (though admitted false by the N.L.R.B.) read precisely as one of refusing to bargain (not of bargaining in bad faith). The unfair bargaining idea is then added by the pro-union (not pro-employee) regional office. The regional office knows the biased machinery working for them; the chances for victory were about one-hundred out of one-hundred with the A.L.J., especially when the matter was discussed before the trial, and one-thousand percent with the Board. In the Appeals Court it was not a question of perfect batting, but the N.L.R.B. achieves excellent results because of the Court's willingness to often bow to the Board's expertise. This saves much time in reducing the work load of the Appellate Judges. The N.L.R.B. is responsible for a lot of this load.

We wonder why the N.L.R.B. and the Solicitor General do not display more candor in dealing with this Court? Do they think justice is served by not disclosing fully matters which petitioners confront them with in this Court?

CONCLUSION

The Legislature entrusted the N.L.R.B. with great powers in the field of labor and management relations. The Board has the power to interpret the Statute, thus making new law by precedent. They also have the power to judge the transgressors of the Act. The General Counsel has the power to investigate and prosecute. These powers are so great that the possibility of bias must at all times be guarded against. These powers were no doubt given by Congress in the confidence that they would not be abused as they control matters which concern so many of the people. The General Counsel and Board share the same premises, they consult back and forth concerning cases and prosecutions. So where is the separation of powers? The San Francisco Regional Office, which instigated this case shares the same building with the A.L.J.s. In our case it is a fact that the A.L.J. consulted with the Board's people before the hearing.

Correction of governmental abuses was not forthcoming from our plea to the Board for a full hearing and investigation of their Regional Office's tactics in this case. Subsequently an Appeals Court turned a deaf ear on the Government Attorney's revelation of the false charge. The only remaining source of correction of governmental abuse

lies with this Court. Had the people involved making the decisions below not debased their profession by upholding the falsely based condemnation of the petitioner, the judicial branch of the Government would be spared the hours required to process and consider this petition for Certiorari. If more fair trials, with honest lawyers, prosecutors, and well-reasoned, unbiased decisions were made in the courts of this land, there would be enough confidence created in the courts that appeal would become a rare thing. The savings for the public would be enormous in terms of time, costs, and the agony of delay. Legal recourse to the top levels of the court system by the appellate process would be rare and most cases appealed would be of real merit deserving the attention that less harried judges could give them. Judges would have the opportunity to write decisions that are not ad hoc, but decisions of future value to the judicial system and the citizenry of the nation.

We ask the Court to show that it will not tolerate "sloppiness" in the workings of the Courts below. Lack of primary professional work in the Judge's decision, the prosecutor or defense attorney's pleading on the subject matter of a case cannot be accepted. Also honesty and courtesy of all participants

is required. If this were done now, perhaps in the six years before the next centennial of the Constitution, we might achieve a fairness in the Government and courts that was only dreamed of by the Founding Fathers.

We pray that Certiorari be granted in spite of the Solicitor General's opposition. As I sincerely believe that the type of chicanery here revealed in Government can only be eliminated by a strong stand against it with a decision from the bench of the highest court. The people should not be deprived of justice and fairness at the base.

Respectively and sincerely submitted,

Mark J. Thomas, Petitioner

March 14, 1981

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years of age, a resident of Santa Clara County, and not a party to the within action. My business address is 50 Bellevue Avenue, San Jose, California, 95110. I served three copies of the attached Brief for Petitioner in Reply to Brief for the National Labor Relations Board in Opposition by placing said copies in an envelope which was then sealed and postage fully prepaid thereon, and was, on March 16, 1981 deposited in the United States Post Office, 105 N. First Street, San Jose, California, to the following persons:

William A. Lubbers,
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

All persons required to be served have been served.

That there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 16, 1981
March 16, 1981

Suzanne D. Thomas